

Federal Communications Commission

DA 02-3367

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Before the
Federal Communications Commission
Washington, DC 20554

DEC 09 2002

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In the Matter of)	
)	
Request for Waiver by)	
)	
Republic County Unified School District #427)	File No. SLD-257681
Belleville, Kansas)	
)	
Federal-State Joint Board on)	CC Docket No. 96-45✓
Universal Service)	
)	
Changes to the Board of Directors of the)	CC Docket No. 97-21
National Exchange Carrier Association, Inc.)	

ORDER

Adopted: December 5, 2002

Released: December 6, 2002

By the Telecommunications Access Policy Division, Wireline Competition Bureau:

1. Before the Telecommunications Access Policy Division is a Waiver Request filed by Republic County Unified School District No. 427 (Republic County), Belleville, Kansas.¹ Port Angeles requests a waiver of the filing deadline of October 28, 2001 for filing FCC Forms 486 in Funding Year 2001 of the schools and libraries universal service support mechanism.² For the reasons set forth below, the Waiver Request is denied.

2. The Schools and Libraries Division (SLD) of the Universal Service Administrative Company (Administrator) administers the schools and libraries support mechanism under the direction of the Commission.³ After an applicant for discounted services under the schools and libraries support mechanism has entered into agreements for eligible services with one or more service providers, it must file with SLD an FCC Form 471

¹ Letter from Larry Lysell, Republic Unified School District No. 427, to Federal Communications Commission, filed May 20, 2002 (Waiver Request).

² Waiver Request. In prior years, Funding Year 2001 was referred to as Funding Year 4. Funding periods are now described by the year in which the funding period starts. Thus the funding period that began on July 1, 2001 and ended on June 30, 2002, is now called Funding Year 2001. The funding period that began on July 1, 2002 and ends on June 30, 2003 is now known as Funding Year 2002, and so on.

³ *Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board on Universal Service*, CC Docket Nos. 97-21 and 96-45, Third Report and Order in CC Docket No. 97-21 and Fourth Order on Reconsideration in CC Docket No. 97-21 and Eighth Order on Reconsideration in CC Docket No. 96-45. 13 FCC Rcd 25058 (1998).

application.⁴ The FCC Form 471 notifies SLD of the services that have been ordered and supplies an estimate of funds needed to cover the discounts to **be** given for eligible services.⁵ SLD then issues a funding commitment decision letter indicating the discounts, if any, to which the applicant is entitled.

3. After the funding year begins and the discounted service commences, the approved recipient of discounted services submits to SLD an FCC Form 486, which indicates that the service has begun and specifies the service start date.⁶ After receiving the FCC Form 486, SLD will accept invoices from the service provider and issue disbursements to the provider in cumulative amounts **up** to the amount of the discount awarded.⁷ Under the “120 day rule,” an applicant must submit its FCC Form 486 for a service no later than 120 days after the commencement of the service or the issuance of SLD’s funding decision, whichever is later.⁸ If an applicant files its FCC Form 486 after this 120 day period, the date 120 days before the filing of the FCC Form 486 becomes the service start date for funding purposes.⁹

4. With the passage of the Children’s Internet Protection Act (CIPA), Congress amended section 254 of the Act, imposing new conditions on schools that “hav[e] computers with Internet access” and request discounted services under the schools and libraries universal service support mechanism.¹⁰ Under section 254(h)(5), no school, except for schools that seek only discounts on telecommunications services, may receive universal service discounts unless the authority with responsibility for administration of the school makes certain certifications, and ensures the use of computers with Internet access in accordance with the certifications.”

5. Congress established the conditions on the use of computers with Internet access in two separate acts, CIPA, which added section 254(h)(5) (establishing certification requirements for schools) and (h)(6) (establishing similar requirements for libraries), and the Neighborhood Children’s Internet Protection Act (NCIPA), which added section 254(l)

⁴ See Schools and Libraries Universal Service, Services Ordered and Certification Form, OMB 3060-0806 (October 2000) (FCC Form 471).

⁵ 47 C.F.R. § 54.504(c)

⁶ Schools and Libraries Universal Service, Receipt of Service Confirmation Form, OMB 3060-0853 (July 2001) (FCC Form 486); Instructions for Completing the Schools and Libraries Universal Service, Receipt of Service Confirmation Form (FCC Form 486), OMB 3060-0853 (July 2001) (Form 486 Instructions). In addition, an early filing option exists for Funding Year 2001 applicants whose services begin on or before October 28, 2001 and for applicants in subsequent funding years whose services begin on or before July 1 of the funding year. See FCC Form 486.

⁷ See FCC Form 486; Form 486 Instructions

⁸ See Form 486 Instructions at 8-12

⁹ *Id.*

¹⁰ 47 U.S.C. § 254(h)(5). Section 254(h)(6) applies the same requirements to libraries. However, as noted below, this latter section was recently found to be unconstitutional. See *infra*, note. 24.

¹¹ 47 U.S.C. §§ 254(h)(5)(A), (h)(5)(A)(ii)

(establishing additional requirements for both schools and libraries).” Under section 254(h)(5), which governs schools, applicants are required to certify that they are enforcing a policy of Internet safety as defined in NCIPA, and that their policy of Internet safety also includes the use of a “technology protection measure,” colloquially referred to as a software filter, that is in accordance with requirements specified in the CIPA provisions.¹³ Under NCIPA, codified at 254(h)(1), schools are required to adopt and implement an Internet safety policy that addresses (1) access by minors to inappropriate material on the Internet, (2) the safety and security of minors when using electronic communications, (3) unauthorized access, (4) unauthorized disclosure, use, and dissemination of personal identification information regarding minors; and (5) measures designed to restrict minors’ access to material harmful to minors.¹⁴

6. To implement these new provisions, the Commission issued the *CIPA Order*, which, *inter alia*, added new certifications for CIPA and NCIPA to the FCC Form 486 beginning in Funding Year 2001.¹⁵ In cases of consortium applicants, the Commission put the certifications on a new FCC Form 479, which must be completed by each of the consortium members and then collected and retained by the consortium leader.¹⁶ The Commission also amended its rules, adding the CIPA requirements at section 54.520.¹⁷

7. To comply with CIPA’s statutory requirement that applicants in Funding Year 2001 make their certifications within 120 days of the start of the funding year, the Commission added an additional deadline to the normal 120 day rule for FCC Forms 486.¹⁸ Under CIPA, Funding Year 2001 applicants were required to file their FCC Forms 486 by no later than October 28, 2001 unless their service began after that date or a funding commitment decision letter issued after that date.” A Funding Year 2001 applicant with a funding commitment decision letter who failed to meet the October 28, 2001 deadline could obtain discounts only for services received on or after the date that its FCC Form 486 was postmarked.”

¹² See Neighborhood Children’s Internet Protection Act (NCIPA), Pub. L. 106-554 §§ 1731 *et seq.*

¹³ 47 U.S.C. §§ 254(h)(5), 254(h)(6). These software filters are designed to block access to Internet sites containing sexually explicit or otherwise objectionable material. See *American Library Association, Inc. v. United States*, Nos. CIV.A. 01-1j03, CIV.A. 01-1322, 2002 WL 1126046, *23-26 (E.D. Penn. May 31, 2002).

¹⁴ See NCIPA, Pub. L. 106-554 § 1732, codified at 47 U.S.C. § 254(l).

¹⁵ See *Federal-State Joint Board on Universal Service, Children’s Internet Protection Act*, CC Docket No. 96-45, Report and Order, 16 FCC Rcd 8182 (2001) (*CIPA Order*); 47 C.F.R. § 54.520.

¹⁶ *CIPA Order*, 16 FCC Rcd at 8194, para. 25.

¹⁷ 47 C.F.R. § 54.520.

¹⁸ See 47 U.S.C. §§ 254(h)(5)(E), 254(h)(6)(E).

¹⁹ 47 U.S.C. §§ 254(h)(5)(E), 254(h)(6)(E); *CIPA Order*, 16 FCC Rcd at 8188-89, 8191, paras. 10, 18.

²⁰ See Form 486 Instructions at 9. This rule (using the submission date of the FCC Form 486 as the new service start date) was only for Funding Year 2001, to comply with CIPA’s statutory mandate. Under current rules, the 120 day rule, see *supra*, paras. 2, 6, applies. Thus, under the current rule, if an applicant with a Funding Commitment Decision Letter issued prior to July 1, 2003 has a service starting on July 1, 2003, but fails to submit its FCC Form

8. Republic County submitted two applications in Funding Year 2001, Application Nos. 242222 and 257681, both applications listing five Funding Request Numbers (FRNs) seeking discounts on telecommunications and Internet access services.²¹ In connection with Form 471 No. 242222, Republic County failed to submit certifications and attachments until February 27, 2001, after the close of the filing window.²² As a result, Form 471 No. 242222 was not issued a Receipt Acknowledgement Letter or a Funding Commitment Decision Letter.²³ However, SLD issued an RAL for Form 471 No. 257681 on February 21, 2001, and on August 8, 2001, issued a Funding Commitment Decision Letter, granting all of Republic County's funding requests.²⁴

9. On October 22, 2001, Republic County filed an FCC Form 486, but listed the FRNs from Form 471 No. 242222, which had not been approved.²⁵ Because Form 471 No. 242222 had not been approved, SLD contacted Republic County on November 26, 2001, and informed it that funds had not yet been committed for the FRNs, and that Republic County should fax in an authorization to withdraw the FCC Form 486 and resubmit it after the issuance of the Funding Commitment Decision Letter.²⁶ On November 29, 2001, Republic County withdrew its FCC Form 486.²⁷

10. On February 27, 2002, Republic County filed a new FCC Form 486, this time indicating receipt of service for the FRNs that had been approved as part of Form 471 No. 257681.²⁸ The service for all five of these FRNs began on July 1, 2001.²⁹ However, because Republic County had missed the October 28, 2001 filing deadline, it was entitled to receive funding only for services received on or after the February 27, 2002 date on which its FCC Form

486 until January 1, 2004, the service start date **will** be September 3, 2003, or 120 days before the submission of the FCC Form 486.

²¹ FCC Form 471, Republic County Unified School District 427, filed January 17, 2001 (Form 471 No. 242222); FCC Form 471, Republic County Unified School District 427, filed January 18, 2001 (Form 471 No. 257681);

²² Form 471 N. 242222

"See *id.* (listing status of funding requests as "pending")

²⁴ Letter from Schools and Libraries Division, Universal Service Administrative Company, to Theresa Gram, Republic County Unified School District 427, dated February 21, 2001 (RAL); Letter from Schools and Libraries Division, Universal Service Administrative Company, to Theresa Gram, Republic County Unified School District 427, dated August 7, 2001 (Funding Commitment Decision Letter).

²⁵ FCC Form 486,

²⁶ Universal Service Administrative Company, Schools and Libraries Division. Notes, Republic County USD 427, November 21, 2001 (noting phone contact with Larry Lysell on November 26, 2001).

²⁷ Letter from Larry Lysell. Republic County Unified School District No. 427, to Schools and Libraries Division, Universal Service Administrative Company, filed November 29, 2001

²⁸ Letter from ; FCC Form 486, Republic County USD 427, filed February 27, 2002

²⁹ See Form 471 No. 257681

486 was filed.³⁰ Thus, on May 1, 2002, SLD issued a Form 486 Notification Letter, indicating that the service start date for these FRNs was being adjusted to February 27, 2002 because of the CIPA deadline.³¹ Under SLD's procedures, once SLD adjusts the services start date, it will not pay for services delivered prior to that time.³² As a result, Republic County was not eligible for funding for that part of its services that it received prior to February 27, 2002. On May 20, 2002, Republic County filed the pending Waiver Request seeking a waiver of the CIPA deadline so that it could receive discounts on services going back to July 1, 2001.³³

11. In its Waiver Request, Republic County asserts that it was unaware that its contact person had submitted two applications rather than one, and that it never received a Funding Commitment Decision Letter on Form 471 No. 257681.³⁴ It argues that there was no way that it could have known that there was an application other than Form 471 No. 242222, and its referring to the latter in its original FCC Form 486 and failure to timely file an FCC Form 486 for the former should be excused.³⁵

12. We cannot grant a waiver from the October 28, 2001 deadline.³⁶ Although the Commission has authority to waive regulatory requirements, it does not have authority to waive

³⁰ Letter from Schools and Libraries Division, Universal Service Administrative Company, to Anne Badalamenti, St. Helen School, Form 486 No. 172423, dated February 13, 2002; Letter from Schools and Libraries Division, Universal Service Administrative Company, to Anne Badalamenti, St. Helen School, Form 486 No. 172425, dated February 13, 2002.

³¹ Letter from Schools and Libraries Division, Universal Service Administrative Company, to Teresa Whitney, Republic County USD 427, dated May 1, 2002.

³² See Form 486 Instructions at 9.

³³ Waiver Request

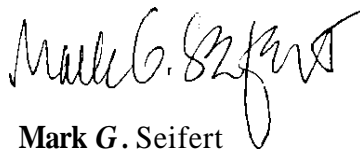
³⁴ Waiver Request at 1-2. We do note, however, that a Funding Commitment Decision Letter was issued to Republic County. The Commission has held repeatedly that an item mailed is presumed to be received by the addressee, and Republic County has not provided any evidence to rebut this presumption. *Columbia Millimeter Communications, LP*, 14 FCC Rcd 2782, para. 10 (1999). Further, the record demonstrates that, at or near the time that the Funding Commitment Decision Letter was issued, August 7, 2001, Republic County's initial contact person, Teresa Gram, had ceased to handle the application. See Waiver Request (Teresa Whitney hired to handle application in September of 2001). However, Republic County did not notify SLD of this change until March 27, 2002. Letter from Teresa Whitney, Republic County Unified School District No. 427, to Schools and Libraries Division, Universal Service Administrative Company, filed March 27, 2002 (Contact Change Letter). It therefore appears likely on the record that Republic County's lack of notification resulted from Republic County's failure to timely update its contact information. In any case, Republic County could have become aware of its application status in a timely fashion even without the Funding Commitment Decision Letter by periodically checking SLD's website or contacting SLD directly. See SLD website, <<http://www.sl.universalservice.org/funding/>> ("Each wave of letters will be mailed to applicants on Friday. The following Monday a list of recipients in each wave are posted here under the State Funding Reports area.")

³⁵ *Id.*

a requirement imposed by statute.³⁷ The October 28, 2001 deadline for schools receiving Internet access and internal connections discounts to submit their CIPA certifications in Funding Year 2001 is set in the statute, which requires that CIPA certifications must be made within 120 days of the start of the first funding year following the effective date of the statute.³⁸ Because Republic County was receiving discounts on Internet access, and was therefore subject to the October 28, 2001 deadline imposed by the CIPA statute, we are without authority to waive that deadline in this case, and the Waiver Request must be denied.³⁹

13. ACCORDINGLY, IT IS ORDERED, pursuant to authority delegated under sections 0.91, 0.291, 1.3, and 54.722(a) of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, 1.3, and 54.722(a), that the Waiver Request filed by Republic County Unified School District No. 427, Belleville, Kansas, on May 20, 2002 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION



Mark G. Seifert
Deputy Chief, Telecommunications Access Policy Division
Wireless Competition Bureau

³⁷ See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Memorandum Opinion and Order, 15 FCC Rcd 7170, para. 13 (1999); see also *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979) ("the exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to the limitations which that body imposes").

³⁸ 47 U.S.C. § 254(h)(5)(E)(i) (1); see *Federal-State Joint Board on Universal Service, Children's Internet Protection Act*, CC Docket No. 96-45, Report and Order, 16 FCC Rcd 8182, paras. 10-14 (2001).

³⁹ See Letter from Schools and Libraries Division, Universal Service Administrative Company, to Helen Millikin, East Carroll Parish School Board, dated July 23, 2001 (Funding Commitment Decision Letter). The United States District Court for the Eastern District of Pennsylvania has recently held the CIPA requirements, as applied to libraries, partially unconstitutional. See *American Library Association, Inc. v. United States*, Nos. CIV.A. 01-1303, CIV.A. 01-1322, 2002 WL 1126046 (E.D. Penn. May 31, 2002). Pursuant to this decision, the Commission has, *inter alia*, directed that Funding Year 2001 library applicants not be penalized for failure to meet CIPA's October 28, 2001 certification deadline. See *Federal-State Joint Board on Universal Service, Children's Internet Protection Act*, CC Docket No. 96-45, Order, FCC 02-196 (rel. June 28, 2002) (*CIPA II Order*). However, neither the court's decision nor the Commission's order in any way affected the CIPA obligations of school applicants. See *CIPA II Order*, para. 19.